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Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO, JR.  
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IN THE  
SUPREME COURT  
OF THE UNITED STATES

OCTOBER TERM, 1987

JACQUE RONALD INSCOE,

Petitioner,

vs.

ACTON CORPORATION, ET AL., AND,  
DIRECTOR, OFFICE OF WORKER'S  
COMPENSATION PROGRAMS, U.S. DEPARTMENT  
OF LABOR,

Respondents.

BRIEF FOR THE RESPONDENTS  
IN OPPOSITION TO THE PETITION  
FOR A WRIT OF CERTIORARI

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Acton Corporation

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NOTE: The opinions of the proceedings below:

1. United States Court of Appeals for the District of Columbia
2. U.S. Department of Labor Benefits Review Board
3. U.S. Department of Labor Office of Administrative Law Judges
4. U.S. Department of Labor Office of Worker's Compensation Programs

are printed in full in the Petitioner's brief.



## STATUTES

1. The applicable federal statute, Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. Sections 933(b), (f) and (g) provide:

33 USCS

Section 933. Compensation for injuries where third persons are liable

(b) Acceptance of compensation acting as assignment

Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner of Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

(f) Institution of proceedings by person entitled to compensation

If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b) [subsec.(b) of this section] the employer shall be



required to pay as compensation under this Act, a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) Compromise obtained by person entitled to compensation

If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this act, the employer shall be liable for compensation as determined in subdivision (g) only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.\*

\*This statute has been revised since the time of the proceedings below.





## CASES CITED

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<u>Brocker Manufacturing and</u> <u>Supply Company, Inc. v.</u> <u>Mashburn, 17 Md. App. 327,</u> <u>301 A.2d 501 (1973) . . . . .</u>	10
<u>Petroleum Helicopters, Inc.</u> <u>v. Collier, 784 F.2d 644</u> <u>(5th Cir. 1986) . . . . .</u>	7
<u>Petro-Weld, Inc. v. Luke,</u> <u>619 F.2d 418 (5th Cir. 1980). . .</u>	7
<u>Ruby v. Dresser Offshore</u> <u>Service, Inc., 8 BRB 432</u> <u>(1978). . . . .</u>	8

## AUTHORITIES

<u>Larson, the Law of Workmen's</u> <u>Compensation, §71.20 (1975) . . .</u>	8
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QUESTIONS PRESENTED  
BY  
THE PETITIONER

I. Whether Section 33(f) and (g) of the Longshoremen's and Harbor Workers' Compensation Act has priority over a valid and binding settlement order of the U.S. Department of Labor.

II. Whether a set-off right is waivable under the Longshoremen's and Harbor Workers' Compensation Act.

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The Respondent suggests that the sole question is whether 33(f) and 33(g) permit a double recovery by a claimant under the Longshoremen's and Harbor Workers' Compensation Act.



### STATEMENT OF CASE

This petition is brought by the claimant, who was injured on June 25, 1979, in a work-related automobile accident. In May 1981, Petitioner settled his workers' compensation claim with the employer, Acton Corporation, for a lump sum of \$100,000.00 with the express approval of the Deputy Commissioner of the Office of Worker's Compensation Programs pursuant to Section 8(i)(A) of the Longshoremen's and Harbor Workers' Act.

Subsequently, the petitioner settled his third party case for an additional \$100,000.00 and thereafter the employer compromised its lien of \$148,000.00 for \$125,000.00.

The petitioner alleges that he continues to incur medical expenses which the respondent declines to pay,



relying on 33 U.S.C. section 933(f)  
which allows the employer credit or  
a set-off until such time as the  
claimant uses up his net third party  
recovery.





### ARGUMENT

This issue can hardly be considered a case of first impression. Section 33(f) of the Longshoremen's and Harbor Workers' Compensation Act has repeatedly been interpreted by the various jurisdictions on various levels to allow the employer to off set or take credit for the claimant's net recovery from a third party. Only after the claimant's net recovery is used up is the employer obligated to pay further benefits.

The United States Court of Appeals for the District of Columbia Circuit (a per curiam unreported case) cited "the clear and convincing reasoning of our sister court," Petro-Weld, Inc. v. Luke, 619 F.2d 418 (5th Cir. 1980), and also Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644 (5th Cir. 1986). Additionally, the Benefits Review Board



has addressed this issue on a number of occasions, including Ruby v. Dresser Offshore Service, Inc., 8 BRB 432 (1978), among others.

Larson, in his treatise on Workmen's Compensation, states:

[T]he claimant should not be allowed to keep the entire amount both of his compensation award and of his common-law damage recovery. The obvious disposition of the matter is to give the employer so much of the negligence recovery as is necessary to reimburse him for his compensation outlay, and to give the employee the excess. This is fair to every one concerned: the employer, who, in a fault sense, is neutral, comes out even; the third person pays exactly the damages he would normally pay, which is correct, since to reduce his burden because of the relation between the employer and the employee would be a windfall to him which he has done nothing to deserve; and the employee gets a fuller reimbursement for actual damages sustained than is possible under the compensation system alone.

2 A. Larson, the Law of Workmen's Compensation, §71.20 (1975).



Although the above appears to be directed primarily to subrogation (not the issue in this case), the underlying principle appears the same: to avoid a double recovery or windfall by a claimant.

The State of Maryland has a similar provision in its Workmen's Compensation Code (Article 101, Section 58, Annotated Code of Maryland), captioned "When Third Party Liable," and has case law stating:

[2] The rule is that when a recovery is made by an injured employee from a negligent third party pursuant to §58, the proceeds are to be distributed as of the time of settlement [or payment of judgment], and future payments by the employer and insurer are suspended until such time, if it occurs, that the net amount received by the injured employee from the negligent third party is exceeded by the benefits

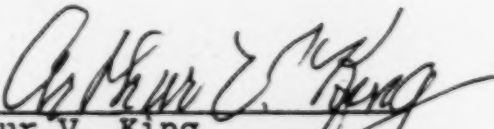


to which the injured employee would have been entitled in the absence of third party liability. At that point in time, the employer and its insurer shall recommence the payment of all benefits provided for in Art. 101. Brocker Manufacturing and Supply Company, Inc. v. Mashburn, 17 Md. App. 327, 301 A.2d 501 (1973).

#### CONCLUSION

For the reasons stated above, and to be fair to every one concerned (as Larson stated), it is requested that this Honorable Court deny the claimant's Petition for a Writ of Certiorari.

Respectfully submitted,

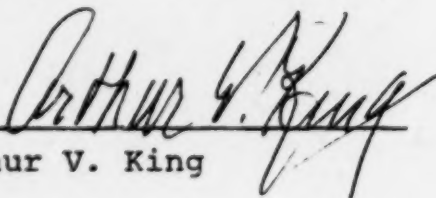
  
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PROOF OF SERVICE

I HEREBY CERTIFY that on this \_\_\_\_\_  
day of February, 1988, I mailed three  
copies of the foregoing to Allan P.  
Feigelson, 5304 Kenilworth Avenue,  
P.O. Box 361, Riverdale, Maryland  
20737, and Director, Office of  
Worker's Compensation Programs, U.S.  
Department of Labor, 200 Constitution  
Avenue, N.W., Washington, D.C. 20001.

  
\_\_\_\_\_  
Arthur V. King